



2-9-2024

The Military Justice Decrescendo

Dwight H. Sullivan

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Military, War, and Peace Commons](#)

Recommended Citation

Dwight H. Sullivan, *The Military Justice Decrescendo*, 68 Vill. L. Rev. 849 (2024).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol68/iss5/5>

This Symposia is brought to you for free and open access by the Journals at Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

2023]

THE MILITARY JUSTICE DECRESCENDO

DWIGHT H. SULLIVAN*

ABSTRACT

This Article documents a long-term precipitous drop in U.S. court-martial and nonjudicial punishment rates. That decline threatens the military justice system's viability. After exploring possible causes of the decline, this Article identifies reducing delays in the system as one means of encouraging higher utilization rates.

* Senior Associate Deputy General Counsel for Military Justice and Personnel Policy, Department of Defense Office of General Counsel; Professorial Lecturer in Law, George Washington University Law School; Colonel, United States Marine Corps Reserve (Ret.); and author of *CAPTURING AGUINALDO: THE DARING RAID TO SEIZE THE PHILIPPINE PRESIDENT AT THE DAWN OF THE AMERICAN CENTURY* (2022). This Article is written in my personal capacity; the views expressed are mine alone and do not necessarily reflect the views of the Department of Defense.

INTRODUCTION

GEORGES Clemenceau is credited with saying, “[m]ilitary justice is to justice as military music is to music.”¹ If so, the U.S. military justice system is in an extended decrescendo. The long-term decline in utilization has affected all three types of courts-martial as well as nonjudicial punishment.

The United States must maintain an effective military justice system. As the Preamble to the *Manual for Courts-Martial* observes, “[t]he purposes of military law are to promote justice, to deter misconduct, to facilitate appropriate accountability, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”² The military justice decrescendo threatens to undermine those purposes.

I. FORMS OF MILITARY JUSTICE ACTIONS

The Uniform Code of Military Justice (UCMJ)³ prescribes four forms of military justice actions: (1) nonjudicial punishment, (2) summary courts-martial, (3) special courts-martial, and (4) general courts-martial. Military leaders have other means to promote discipline, ranging from “counseling”—sometimes delivered at high volume—to initiating administrative discharge proceedings. Those means, however, are largely beyond the scope of this Article, which examines military justice actions.

A. *Nonjudicial Punishment*

Nonjudicial punishment is both the least formal and most frequently used military justice procedure.⁴ It involves a commanding officer punishing a service member for violating one or more of the UCMJ’s punitive articles.⁵ Congress intended nonjudicial punishment to be imposed for “minor offenses.”⁶

1. YALE BOOK OF QUOTATIONS 158 (Fred R. Shapiro ed., 2006); see also ARMAND LANOUX, BONJOUR, MONSIEUR ZOLA 387 (1978) (“Clemenceau s’esclaffe: ‘Décidément, la justice militaire est à la justice ce que la musique militaire est à la musique!’”). See generally Thomas G. Becker, “Military Justice Is to Justice What Military Music Is to Music:” *Anatomy of an Apocryphy or How to Get Kicked Out of a Cocktail Party (Assuming You’re Invited in the First Place)*, 41 Rep. [Air Force Judge Advocate General’s Corps], no. 1, 2014, at 21, 22 (commenting on the quotation).

2. *Manual for Courts-Martial, United States* pt. 1, ¶ 3 (2024 ed.) [hereinafter *MCM*].

3. 10 U.S.C. §§ 801–946a.

4. See generally UCMJ, art. 15, 10 U.S.C. § 815; *MCM*, supra note 2, pt. V.

5. The UCMJ’s punitive articles are set out in 10 U.S.C §§ 877–934. They are a mix of military-specific offenses and analogues to common civilian criminal offenses. See *infra* note 42.

6. UCMJ, art. 15(b), 10 U.S.C. § 815(b). The *Manual for Courts-Martial* explains: Whether an offense is minor depends on several factors: the nature of the offense and the circumstances surrounding its commission; the offender’s age, rank, duty assignment, record and experience; and the maximum sentence impossible for the offense if tried by general court-martial. Ordinarily, a minor offense is an offense for which the maximum sentence impossible would not include a dishonorable discharge or confinement for longer than 1 year if tried

The *Manual for Courts-Martial* explains this forum's purpose: "[n]onjudicial punishment provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in Servicemembers without the stigma of a court-martial conviction."⁷ Available punishments vary somewhat according to the status of both the officer imposing the nonjudicial punishment and the service member receiving it.⁸ Authorized punishments include restriction to certain specified limits, forfeiture of pay, extra duties, and (for certain enlisted service members) reduction in pay grade.⁹ Except for those attached to or embarked on a vessel, service members have the right to refuse to be subjected to nonjudicial punishment.¹⁰ In such instances of nonjudicial punishment refusal, the service member's chain of command will generally decide whether to use some other procedure to address the alleged offense, such as referring the case to a special court-martial or initiating the administrative discharge process.

B. Summary Court-Martial

A summary court-martial is a non-criminal forum in which a single commissioned officer decides whether to find the accused service member guilty of violating one of the UCMJ's punitive articles.¹¹ Officers, cadets, and midshipmen are exempt from trial by summary court-martial, leaving it as a tool to discipline enlisted members.¹²

by general court-martial. The decision whether an offense is "minor" is a matter of discretion for the commander imposing nonjudicial punishment
MCM, *supra* note 2, pt. V, ¶ 1.e.

7. *MCM*, *supra* note 2, pt. V, ¶ 1.c.

8. *Id.* pt. V, ¶ 5.b; UCMJ, art. 15(b), 10 U.S.C. § 815(b).

9. UCMJ, art. 15(b), 10 U.S.C. § 815(b); *MCM*, *supra* note 2, pt. V, ¶ 5.b. Authorized nonjudicial punishments for service members attached to or embarked in a vessel include confinement for three days. UCMJ, art. 15(b)(2)(a), 10 U.S.C. § 815(b)(2)(a); *MCM*, *supra* note 2, pt. V, ¶ 5.b(2)(A)(i). Before January 1, 2019, an authorized nonjudicial punishment for service members attached to or embarked in a vessel was the iconic naval punishment of confinement on bread and water or diminished rations for up to three days. See National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 5141, 5542, 130 Stat. 2000, 2897, 2967 (2016) (codified as amended at 10 U.S.C. § 815); Exec. Order No. 13,825, § 7, 83 Fed. Reg. 9889, 9890 (Mar. 1, 2018) (establishing January 1, 2019, as the effective date for the Military Justice Act of 2016's amendments of UCMJ Article 15).

10. UCMJ, art. 15(a), 10 U.S.C. § 815(a). The nonjudicial punishment statute states that, unless embarked on or attached to a vessel, a service member may "demand[] trial by court-martial in lieu of such punishment." *Id.* That wording, however, is misleading. "In truth, the servicemember cannot technically 'demand' a court-martial, because the accused does not have the authority to . . . initiate a court-martial. Thus, despite the statutory language, it is more accurate to say that servicemembers generally have the right to reject the NJP . . ." *United States v. Stoltz*, 720 F.3d 1127, 1129–30 (9th Cir. 2013) (citation omitted).

11. See generally UCMJ, art. 20, 10 U.S.C. § 820; Rules for Courts-Martial ch. XIII (2024) [hereinafter R.C.M.].

12. UCMJ, art. 20(a), 10 U.S.C. § 820(a). Technically, a summary court-martial may also try those civilians who are subject to court-martial jurisdiction. See *id.* art. 2(a), 10 U.S.C. § 802(a); see also *infra* note 18. In practice, however, summary courts-martial are used to try only enlisted members.

As the *Manual for Courts-Martial* explains, “[t]he function of the summary court-martial is to promptly adjudicate minor offenses under a simple disciplinary proceeding.”¹³ All enlisted members—including those attached to or embarked on vessels—may refuse to be tried by summary court-martial.¹⁴ Authorized punishments include confinement for up to thirty days, forfeiture of up to two-thirds’ pay for one month, and reduction to the lowest enlisted pay grade.¹⁵

C. *Special Court-Martial*

A special court-martial consists of either a military judge and a four-member court-martial panel¹⁶ (the functional equivalent of a jury) or a military judge alone¹⁷ sitting in judgment of a service member or other individual subject to court-martial jurisdiction¹⁸ charged with one or more violations of the UCMJ’s punitive articles.¹⁹ With some departures—such as non-unanimous verdicts²⁰—a special court-martial

13. R.C.M. 1301(b).

14. UCMJ, art. 20(a), 10 U.S.C. § 820(a).

15. R.C.M. 1301(d)(1) (discussion).

16. UCMJ, art. 16(c)(1), 10 U.S.C. § 816(c)(1).

17. *Id.* § 816(c)(2).

18. While invoked extremely rarely, court-martial jurisdiction exists over some civilians, such as discharged service members in the custody of the armed forces serving court-martial sentences and civilians accompanying an armed force in the field during a time of declared war or contingency operation. UCMJ, arts. 2(a)(7), (10), 10 U.S.C. § 802(a)(7), (10); *see, e.g.*, *United States v. Vogan*, 32 M.J. 959, 959 (A.C.M.R. 1991) (court-martial of “a person subject to court-martial jurisdiction pursuant to Uniform Code of Military Justice article 2(a)(7)”), *aff’d*, 35 M.J. 32 (C.M.A. 1992); *United States v. Harry*, 25 M.J. 513, 514 (A.F.C.M.R. 1987) (court-martial of prisoner in military custody after execution of his punitive discharge adjudged by a prior court-martial); *United States v. Ali*, 71 M.J. 256, 264 (C.A.A.F. 2012) (court-martial of civilian accompanying U.S. forces in the field in a contingency operation).

19. Before the reforms enacted by the Military Justice Act of 2016, National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5161, 130 Stat. 2000, 2897–98 (2016) (codified as amended at 10 U.S.C. § 816(c)), a special court-martial could be composed of any number of members not less than three. Also, before the Military Justice Act of 2016, a form of special court-martial existed with members but no military judge. Such a court-martial could not adjudge a punitive discharge or confinement or forfeitures in excess of six months. *See infra* notes 23–24 and accompanying text.

20. UCMJ, art. 52(b)(1), 10 U.S.C. § 852(b)(1). Before the reforms enacted by the Military Justice Act of 2016, with the exception of a general court-martial trying an offense for which death was mandatory, general and special courts-martial reached their verdicts by a two-thirds majority vote. *See* National Defense Authorization Act for Fiscal Year 2017 § 5235. In 2023, the Court of Appeals for the Armed Forces unanimously rejected a constitutional challenge to the military justice system’s authorization of non-unanimous verdicts, and a petition for certiorari in that case was docketed on October 26, 2023. *United States v. Anderson*, 83 M.J. 291, 293 (C.A.A.F. 2023), *petition for cert. filed*, No. 23-437, 2023 WL 7130310 (2023); *see also* *Petition for a Writ of Certiorari, Martinez v. United States*, No. 23-242, 2023 WL 6012591 (2023) (consolidated certiorari petition on behalf of sixteen petitioners presenting the question: “Whether military convictions for serious offenses must be unanimous”); *Petition for a Writ of Certiorari, Cunningham v. United States*,

proceeding is similar to a civilian criminal trial. The jurisdictional maximum sentence for a special court-martial includes a bad-conduct discharge (enlisted accused only), confinement for one year, forfeiture of two-thirds' pay per month for twelve months, and reduction to the lowest enlisted pay grade (enlisted accused only).²¹

The special court-martial has taken different forms over the seventy-plus years that the UCMJ has been in effect. When originally enacted, the UCMJ provided a jurisdictional cap on the sentence that could be imposed by a special court-martial—which then consisted of three or more members—of a bad-conduct discharge, confinement for six months, and forfeiture of two-thirds' pay per month for six months.²² The Military Justice Act of 1968 established two forms of special court-martial—one with a military judge and one without.²³ The former (colloquially called a “BCD special”) could impose a bad-conduct discharge; the latter (colloquially called a “no-BCD special” or “straight special”) could not. The National Defense Authorization Act for Fiscal Year 2000 increased the maximum period of confinement and forfeitures for BCD specials to one year while retaining six months as the maximum for straight specials.²⁴ By 2016, the straight special had almost disappeared; the entire Department of Defense tried one each in fiscal years (FYs) 2015 and 2016 and none in fiscal year (FY) 2014.²⁵ The Military Justice Act of 2016 eliminated the straight special while establishing a

No. 23-666, 2023 WL 8848774 (2023) (presenting the question, *inter alia*: “Whether Senior Airman James T. Cunningham was entitled to a unanimous verdict in his court-martial when the Government convicted him of murder—a serious crime that had no military nexus”).

21. UCMJ, art. 19(a), 10 U.S.C. § 819(a). There is one form of a judge-alone special court-martial that may not impose confinement for more than six months. *Id.* arts. 16(c)(2), 19(b), 10 U.S.C. §§ 816(c)(2), 819(b); *see infra* notes 26–27 and accompanying text. Before 2000, the maximum period of confinement that a special court-martial could adjudge was six months. *See infra* note 24 and accompanying text. Until 2023, a special court-martial could not sentence officers, cadets, or midshipmen to confinement. *Manual for Courts-Martial, United States* ¶ 126d (1951 ed.); *Manual for Courts-Martial, United States* ¶ 126d (1969 rev. ed.); Rule for Courts-Martial 1003(c)(2)(A)(iii) (1984). Executive Order 14,103 of July 28, 2023, rescinded that limitation. Exec. Order No. 14,103, 88 Fed. Reg. 50535, 50562 (July 28, 2023).

22. Uniform Code of Military Justice, ch. 169, arts. 16(2), 19, 64 Stat. 107, 114 (1950) (codified as amended at 10 U.S.C. §§ 816(c), 819).

23. Military Justice Act of 1968, Pub. L. No. 90-632, § 2(3), 82 Stat. 1335, 1335 (1968) (amending Article 16 of the UCMJ).

24. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 577, 113 Stat. 512, 625 (1999).

25. JOINT ANNUAL REPORT OF THE CODE COMMITTEE PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE: OCTOBER 1, 2013 TO SEPTEMBER 30, 2014, at 55, 109, 130, 132 (2014), <https://www.armfor.uscourts.gov/annual/FY14AnnualReport.pdf> [<https://perma.cc/U8A5-QKER>]; JOINT ANNUAL REPORT OF THE CODE COMMITTEE PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE: OCTOBER 1, 2014 TO SEPTEMBER 30, 2015, at 48, 104, 125 (2015), <https://www.armfor.uscourts.gov/annual/FY15AnnualReport.pdf> [<https://perma.cc/FEL9-87BP>]; JOINT ANNUAL REPORT OF THE CODE COMMITTEE PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE: OCTOBER 1, 2015 TO SEPTEMBER 30, 2016, at 49, 102, 122–23 (2016), <https://www.armfor.uscourts.gov/annual/FY16AnnualReport.pdf> [<https://perma.cc/S4AG-JSF2>].

new kind of court-martial consisting of a military judge alone with no opportunity for the accused to elect trial by a panel of court-martial members.²⁶ Dubbed the “short-martial,”²⁷ this new forum inherited the straight special’s inability to adjudge a punitive discharge or more than six months’ confinement or forfeitures.²⁸

D. *General Court-Martial*

The most serious military justice forum is the general court-martial, which consists of eight members and a military judge or a military judge alone in non-capital cases and twelve members and a military judge in capital cases.²⁹ It has jurisdiction to adjudge any sentence authorized for a particular offense, including death.³⁰ Like special court-martial trials, with some departures such as non-unanimous verdicts, a general court-martial’s proceedings closely resemble a civilian criminal trial.

II. THE DECLINING FREQUENCY OF MILITARY JUSTICE ACTIONS

A. *The Mattis Memorandum*

Concern over a decline in military justice actions was noted at the Department of Defense’s highest level in 2018. Secretary of Defense James Mattis had a deep understanding of the military justice system. During his Marine Corps career, he served as a court-martial convening authority at various levels, including as the consolidated disposition authority for matters arising from the death of civilians in Haditha, Iraq.³¹ Nineteen months into his tenure as Secretary of Defense, he had

26. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5161, 130 Stat. 2000, 2898 (2016) (codified as amended at 10 U.S.C. § 816(c) (2)(A)).

27. Two commentators have recommended against using “the often-heard term ‘short-martial’ to refer to this forum, as it may lead commands to believe the process is quicker than the traditional special court-martial.” Jacob E. Thayer & Jessica Dobry, *Dealing with the “Shorter” Limited Special Courts-Martial*, 67 NAVAL L. REV. 191, 196 (2021).

28. Sitting en banc, the Navy-Marine Corps Court of Criminal Appeals unanimously rejected a constitutional challenge to the short-martial. *United States v. Wheeler*, 83 M.J. 581 (N-M. Ct. Crim. App. 2023) (en banc). The Court of Appeals for the Armed Forces granted the defense’s request to review that ruling. 83 M.J. 393 (C.A.A.F. 2023) (order granting review).

29. UCMJ, arts. 16(b), 25a, 10 U.S.C. §§ 816(b), 825a. Before the reforms enacted by the Military Justice Act of 2016, a general court-martial could consist of any number of members not less than five except in capital cases, where it could consist of any number of members not less than twelve. UCMJ, arts. 16(1)(A), 25a, 10 U.S.C. §§ 816(1)(A), 825a (2012) (amended 2016).

30. There are currently four service members under military death sentences. DEATH ROW U.S.A., LEGAL DEF. FUND 58 (2023), <https://www.naacpldf.org/wp-content/uploads/DRUSAWinter2023.pdf> [perma link unavailable].

31. JIM MATTIS & BING WEST, CALL SIGN CHAOS: LEARNING TO LEAD 20, 43, 79, 163–68, 189–90, 263–64 (2021 ed. 2019); *United States v. Chessani*, No. NMCCA 200800299, 2009 WL 690110, at *1 (N-M. Ct. Crim. App. Mar. 17, 2009); Daniel G. Brookhart, “Physician Heal Thyself”: How Judge Advocates Can Commit Unlawful

become worried that commanders were sending cases to courts-martial too rarely, to the potential detriment of the armed forces' good order and discipline.³² "It is a commander's duty to use" the military justice system, Secretary Mattis exhorted.³³ He continued, "[a]dministrative actions should not be the default method to address illicit conduct simply because it is less burdensome than the military justice system."³⁴ As a diagnostic measure, Secretary Mattis's memorandum accurately identified a long-term decline in the military justice system's usage. But it failed as a corrective measure. As discussed below, the military justice decrescendo continued—and in some instances accelerated—after Secretary Mattis issued his memorandum.³⁵

B. *Military Justice Usage Rates*

A rich dataset of military justice actions is available for FYs 1977 to 2022.³⁶ An analysis of that forty-seven-year dataset reveals that all four

Command Influence, ARMY LAW., Mar. 2010, at 56, 57–58; see also MANUAL OF THE JUDGE ADVOCATE GENERAL § 0115.a.(2)(a) (1988) (providing Marine Corps battalion commanding officers with special court-martial convening authority); UCMJ, art. 23(a)(5), 10 U.S.C. § 823(a)(5) (providing Marine Corps regimental commanding officers with special court-martial convening authority); *id.* art. 22(a)(5), 10 U.S.C. § 822(a)(5) (providing Marine Corps division commanding generals with general court-martial convening authority); *id.* § 822(a)(3) (providing commanders of unified and specified combatant commands with general court-martial convening authority). Mattis was also a general court-martial convening authority while serving as Secretary of Defense. See *id.* § 822(a)(2).

32. See Memorandum from Sec'y Def. James N. Mattis to Secretaries of Mil. Dep'ts, Chiefs of Mil. Servs., & Commanders of Combatant Commands on Discipline & Lethality (Aug. 13, 2018), <https://www.usfk.mil/Portals/105/Documents/SECDEF/DISCIPLINE%20AND%20LETHALITY%20OSD010042-18%20FOD%20Final.pdf?ver=2018-08-13-194823-403> [<https://perma.cc/2BSW-GYV6>].

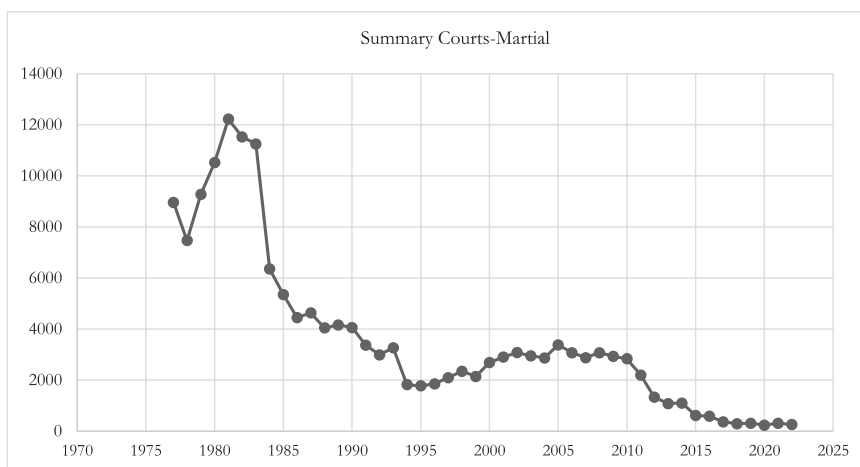
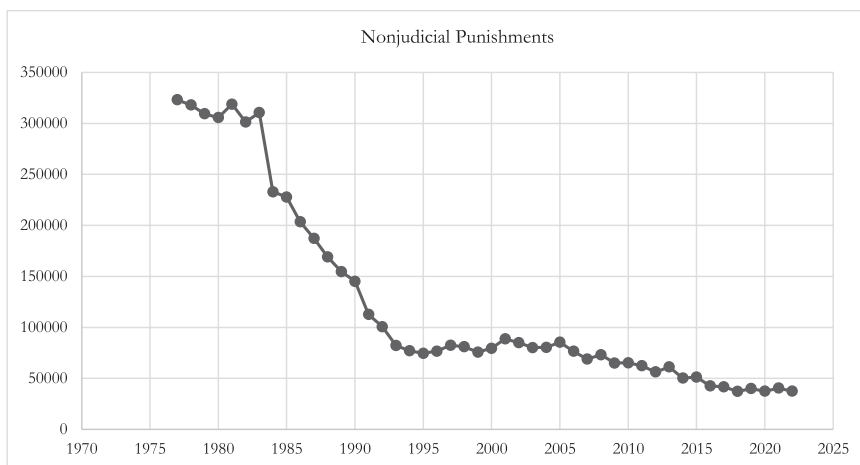
33. *Id.*

34. *Id.*

35. For an excellent analysis of the extent to which declining offense rates explain the decline in Army military justice actions from FY 2007 to FY 2017, see Michael Petrusic, *Discipline as a Vital Tool to Maintain the Army Profession*, MIL. REV., Nov.–Dec. 2020, at 112, 115–16.

36. The datasets are available in the annual reports of the Code Committee for FYs 1977–2017. To access those reports, see *Annual Reports*, U.S. CT. APPEALS ARMED FORCES, https://www.armfor.uscourts.gov/ann_reports.htm [<https://perma.cc/RW92-B4PY>] (last visited Dec. 15, 2023). FY 1977 was the first in which nonjudicial punishment numbers were included in each military department's annual report. ANNUAL REPORT OF THE U.S. COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATE GENERALS OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF TRANSPORTATION PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE: OCTOBER 1, 1976 TO SEPTEMBER 30, 1977, at 19, 34, 39 (1977), <https://www.armfor.uscourts.gov/annual/FY77AnnualReport.pdf> [<https://perma.cc/U4KH-SUEU>]. The Military Justice Act of 2016 eliminated the Code Committee, which had consisted of the judges of the Court of Appeals for the Armed Forces (or the Court of Military Appeals, as that court was named until 1994), the Judge Advocates General, the Staff Judge Advocate to the Commandant of the Marine Corps, and two public members. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5521, 130 Stat. 2000, 2962–64 (2016) (codified as amended at 10 U.S.C. § 946). Beginning with FY 2018, the military services' military justice reports are available on the Joint Service

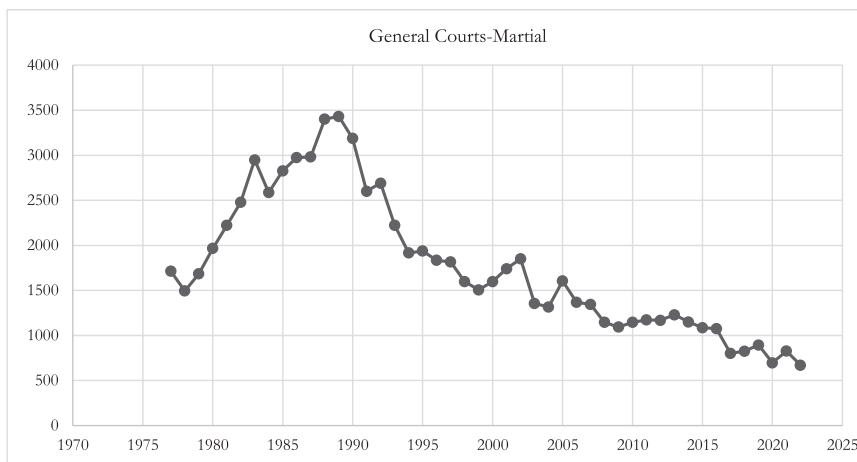
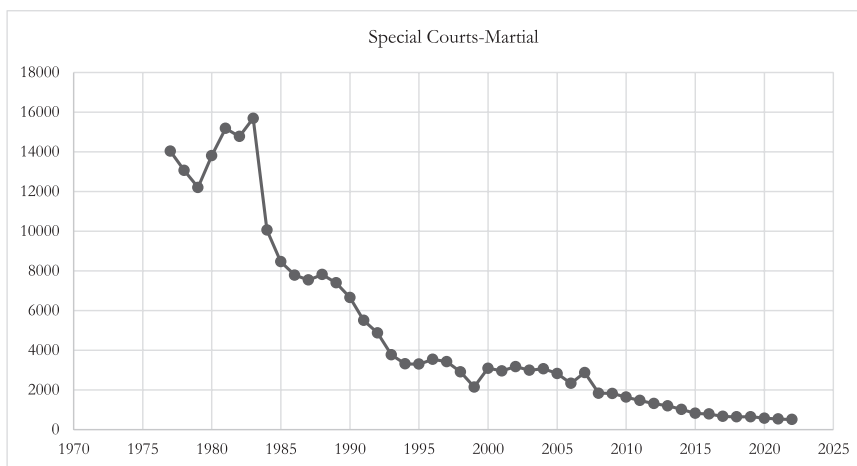
forms of military justice action have declined precipitously.³⁷ The following four charts depict the number of each form of military justice action over the forty-seven-year period.³⁸



Committee on Military Justice's website. *Annual Reports*, JOINT SERV. COMM. ON MIL. JUST., <https://jsc.defense.gov/Annual-Reports/> [<https://perma.cc/2NB4-DLQD>] (last visited Dec. 15, 2023).

37. This analysis is based only on data from the military services within the Department of Defense. The UCMJ also governs military justice proceedings in the Coast Guard. However, the Coast Guard's annual military justice reports for the post-Code Committee era diverged in some respects from those of the other military services—principally by omitting nonjudicial punishment data. To ensure consistency over the entire forty-seven-year study period, this Article's analysis omits Coast Guard data.

38. In the special court-martial chart and all following calculations that involve special courts-martial, all forms of special court-martial in use at the time are included in the special court-martial figure.



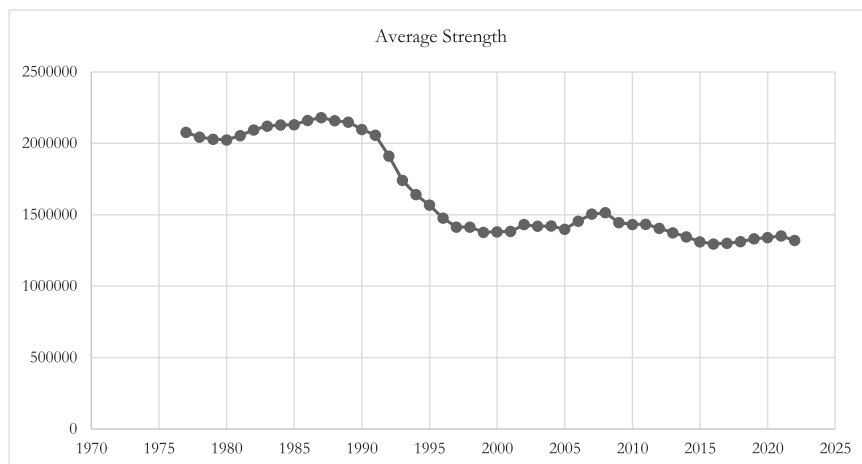
Nonjudicial punishments plummeted from 310,531 in FY 1983 to less than a fourth of that number (74,565) by FY 1995. After a period of minor fluctuation, the number further dropped by almost half from FY 2008 (73,186) to FY 2018 (37,132). Meanwhile, summary courts-martial declined to endangered species levels. They went from a high of 12,217 in FY 1981 to just 256 in FY 2022. While the response to the COVID-19 pandemic may have artificially lowered military justice statistics to some extent for FYs 2020–2022,³⁹ the total for FY 2019 (the last complete fiscal year unaffected by the COVID-19 pandemic) was just 308.

Special courts-martial also saw a sustained drop. The forty-seven-year high—15,693 in FY 1983—was more than thirty times the FY 2020 total of just 509.

39. See generally Eugene R. Fidell, *COVID-19 and Military Law*, 11 J. NAT'L SEC. L. & POL'Y 181, 187–92 (2020) (assessing the impact of the COVID-19 pandemic on the military justice system).

The general court-martial rate of reduction was not as sharp as those of the other three forms of military justice actions. The high during the forty-seven years (3,432) came in FY 1989—the second complete fiscal year after the Supreme Court expanded the range of offenses that fell within the military justice system’s subject-matter jurisdiction by eliminating the service connection test.⁴⁰ Other than the COVID-affected years of FYs 2020 and 2022—when just 697 and 670 general courts-martial were tried, respectively—the low was 802 in FY 2017. While the annual average number of general courts-martial for the five-year period of FYs 2016–2020 (859.2) is only one-fourth of the FY 1989 high water mark, that reduction is modest compared to those of the other forms of military justice actions.

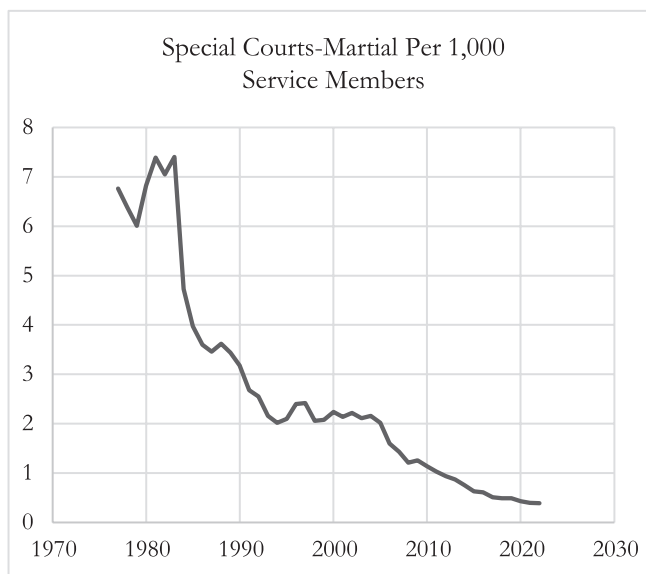
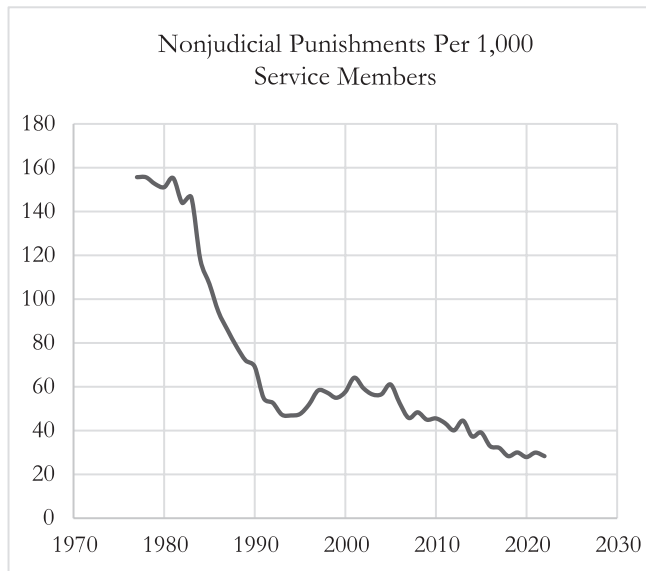
The absolute numbers of cases are important for assessing the system’s viability. But the raw numbers do not tell the entire story. As the following chart depicts, the size of the military force has varied considerably over the forty-seven-year study period—from a high of 2,180,228 in FY 1987 before the fall of the Berlin Wall to a low of 1,295,446 in FY 2016.⁴¹

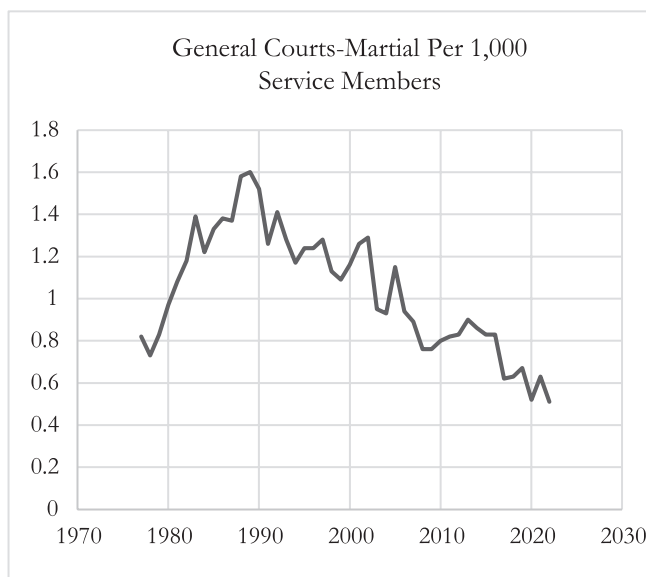
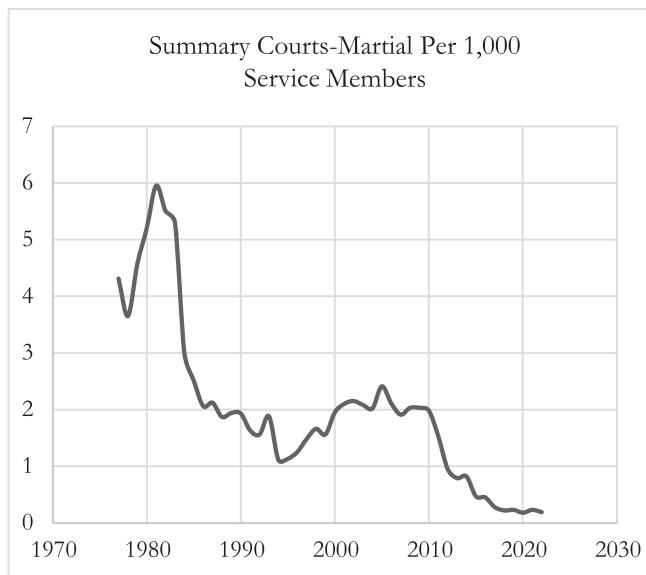


40. *Solorio v. United States*, 483 U.S. 435 (1987) (overruling *O’Callahan v. Parker*, 395 U.S. 258 (1969)).

41. This chart is based on average strength data included in the same reports discussed *supra* note 36. To ensure consistency with the military justice data, the calculation of the number of personnel is limited to the military services within the Department of Defense, omitting the Coast Guard. One adjustment was made to the data. The FY 1984 Code Committee report contains an obvious mistake regarding the average strength of the Department of the Navy. The 607,692 figure is twenty percent lower than that of the FYs that preceded and followed it. The Department of the Navy’s end strength for FY 1984 was actually 9,190 greater than for FY 1983, making it unlikely that the FY 1984 average strength dipped by twenty percent. Compare *DoD Personnel, Workforce Reports & Publications*, DEF. MANPOWER DATA CTR., <https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports> [<https://perma.cc/K2CE-WVG7>] (last visited Dec. 15, 2023) (choose “Historical Reports - FY 1954 – 1993 (Not DMDC Data)” under “Military Personnel” heading; then choose Excel file labeled “September1985”), *with id.* (choose Excel file labeled “September1984”). To avoid skewing rate per 1,000 calculations due to an obvious error, an average of the 1983 and 1985 Department of the Navy numbers (760,061) was used to calculate the 1984 average strength statistic.

It is instructive to examine the rate of military justice actions per capita.





When military justice actions are calculated on a rate-per-1,000 basis, the precipitous declines are still present, though somewhat less pronounced, particularly for general courts-martial. For example, the FY 2015 and FY 2016 general court-martial rates per 1,000 roughly equal that for FY 1979 while exceeding those for FYs 1977 and 1978. The rates for FYs 2017–2022, however, dropped considerably lower. The rate of decline for other military justice actions was steeper and more sustained.

III. IMPLICATIONS OF THE DECLINING FREQUENCY OF MILITARY JUSTICE ACTIONS

A. *An Effective Military Justice System's Importance to the U.S. Armed Forces*

Maintaining an effective military justice system is vital for at least three reasons: (1) it addresses military-specific offenses and offenses with unique implications for the armed forces, (2) it deploys with U.S. forces overseas, and (3) it provides a foundation for an expanded system in a mass-mobilization context.

1. *Military Offenses and Offenses with Unique Effects in a Military Context*

Even within the United States, civilian criminal justice systems could not fill the vacuum if the military justice system were to falter. A military justice system is necessary to address both military-specific offenses that cannot be prosecuted in civilian court systems and offenses whose seriousness may be viewed differently in a military setting.⁴²

There is no civilian counterpart to UCMJ offenses such as desertion, absence without leave, or failure to obey an order or regulation.⁴³ Another military criminal offense that directly addresses a unique military interest in unit cohesion is sexual harassment. The military is a rare American jurisdiction—and one of few in the world—to criminalize non-contact sexual harassment.⁴⁴ The military has successfully

42. The UCMJ includes ninety-four “punitive articles.” UCMJ, arts. 77–134, 10 U.S.C. §§ 877–934. Many of the punitive articles use the same number followed by a letter, such as Articles 120, 120a, 120b, and 120c, thereby producing ninety-four articles in the range from Article 77 to Article 134. Many of those punitive articles establish multiple offenses. Approximately one-third of the punitive articles deal with military-specific offenses, such as malingering, desertion, contempt toward officials, failure to obey order or regulation, and misbehavior toward the enemy. *Id.* §§ 883, 885, 888, 892, 899. The *Manual for Courts-Martial* also enumerates eighteen presidentially prescribed offenses that can violate the “General Article,” Article 134, which includes prohibitions against conduct prejudicial to good order and discipline and service-discrediting conduct. *MCM*, *supra* note 2, pt. IV, ¶¶ 92–108.

43. UCMJ, arts. 85, 86, 92, 10 U.S.C. §§ 885, 886, 892.

44. *Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257, 275 n.14 (4th Cir. 2021) (“Generally speaking, while federal and state laws criminalize physical sexual assault, they prescribe only civil remedies for verbal sexual harassment.”), *cert. denied*, 143 S. Ct. 442 (2022); Michal Buchhandler-Raphael, *Criminalizing Coerced Submission in the Workplace and in the Academy*, 19 COLUM. J. GENDER & L. 409, 439 (2010) (“Texas is the only state which specifically criminalizes one form of sexual harassment by banning ‘quid pro quo’ in the workplace.” (citing TEX. PENAL CODE ANN. § 39.03(a)(3), (c) (Vernon 2009))); Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOKLYN L. REV. 39, 107 (1998) (“Three states criminally punish sexual harassment.”). France has criminalized sexual harassment since 1992 under a statute that was modified in 1998 and 2002. However, in 2012, a French court invalidated the revised statute as impermissibly vague. Conseil Constitutionnel [CC] [Constitutional Court] decision no. 2012-240QPC, May 4, 2012 (Fr.). See generally L. Camille Hébert, *Dignity and Discrimination in Sexual Harassment Law: A French Case Study*, 25 WASH. & LEE J.C.R. & SOC. JUST. 3 (2018) (examining the history of criminalization of sexual harassment under French law). The law was modified in 2012 and again in 2018. See CODE PÉNAL (C. PÉN.) [PENAL CODE] art. 222–33 (Fr.); see also Karen Musalo, *El Salvador—A Peace Worse*

prosecuted sexual harassment cases under UCMJ Articles 92 (prohibiting violation of lawful general orders and dereliction of duty)⁴⁵ and 93 (prohibiting maltreatment of a subordinate).⁴⁶ Rather than continuing to rely on punitive articles that were not expressly focused on the criminalization of sexual harassment, in 2021, Congress directed the President to prescribe sexual harassment as a specified offense prosecutable under UCMJ Article 134, the “General Article.”⁴⁷ President Joseph R. Biden Jr. implemented that statutory provision by issuing Executive Order 14,062 on January 26, 2022.⁴⁸ The history of sexual harassment’s criminalization in the military demonstrates the importance of a viable military justice system in two ways. First, it is an example of the military justice system’s criminalization of behavior that is not criminal in many civilian jurisdictions but for which there is a special military need to both

Than War: Violence, Gender and a Failed Legal Response, 30 YALE J.L. & FEMINISM 3, 44 (2018) (discussing El Salvador’s criminalization of sexual harassment by a superior).

45. See, e.g., *United States v. Martin*, No. 202100089, 2023 WL 2125135 (N-M. Ct. Crim. App. Feb. 21) (per curiam), *review granted*, 83 M.J. 434 (C.A.A.F. 2023); *United States v. Da Silva*, No. ACM 39599, 2020 WL 3468282 (A.F. Ct. Crim. App. June 25, 2020); *United States v. Araujo*, No. 201900102, 2020 WL 1922495 (N-M. Ct. Crim. App. Apr. 21, 2020); *United States v. Olivares*, No. 201800125, 2019 WL 1076454 (N-M. Ct. Crim. App. Mar. 7, 2019) (en banc) (per curiam); *United States v. Shields*, 77 M.J. 621 (N-M. Ct. Crim. App. 2018); *United States v. Bannister*, No. 201600056, 2018 WL 4354995 (N-M. Ct. Crim. App. Sept. 12, 2018); *United States v. Villalobos*, No. 201700097, 2018 WL 563591 (N-M. Ct. Crim. App. Jan. 26, 2018) (per curiam); *United States v. Gomez*, 76 M.J. 76 (C.A.A.F. 2017); *United States v. Rosario*, 76 M.J. 114 (C.A.A.F. 2017); *United States v. Dunbar*, No. 201600121, 2016 WL 7242769 (N-M. Ct. Crim. App. Dec. 15, 2016) (per curiam); *United States v. Quichocho*, No. 201500297, 2016 WL 6994361 (N-M. Ct. Crim. App. Nov. 29, 2016); *United States v. Riggins*, No. NMCCA 201400046, 2016 WL 4064141 (N-M. Ct. Crim. App. July 28, 2016) (per curiam); *United States v. Cobb*, No. ARMY 20140631, 2016 WL 3208762 (A. Ct. Crim. App. May 27, 2016) (per curiam); *United States v. Johnson*, No. NMCCA 201500196, 2016 WL 1718099 (N-M. Ct. Crim. App. Apr. 28, 2016) (per curiam); *United States v. Marrero-Alvarez*, No. NMCCA 201600011, 2016 WL 1670182 (N-M. Ct. Crim. App. Apr. 26, 2016) (per curiam); *United States v. Bass*, 74 M.J. 806 (N-M. Ct. Crim. App. 2015); *United States v. Bushnell*, No. NMCCA 201400364, 2015 WL 1598111 (N-M. Ct. Crim. App. Apr. 9, 2015) (per curiam); *United States v. Owens*, No. NMCCA 201300485, 2015 WL 124571 (N-M. Ct. Crim. App. Jan. 8, 2015); *United States v. Doyle*, No. NMCCA 201300442, 2014 WL 5449493 (N-M. Ct. Crim. App. Oct. 28, 2014) (per curiam); *United States v. Goodman*, 70 M.J. 396 (C.A.A.F. 2011).

46. See, e.g., *United States v. Anderson*, 78 M.J. 727 (A. Ct. Crim. App.), *review granted in part, decision set aside*, 79 M.J. 299 (C.A.A.F. 2019), *findings and sentence affirmed on remand*, 79 M.J. 762 (A. Ct. Crim. App. 2020); *United States v. Miles*, No. ARMY 20150415, 2017 WL 218834 (A. Ct. Crim. App. Jan. 17, 2017); *United States v. Knox*, 75 M.J. 933 (C.G. Ct. Crim. App. 2016); *United States v. Caldwell*, 75 M.J. 276 (C.A.A.F. 2016); *United States v. Twomley*, No. 1412, 2016 CCA LEXIS 233 (C.G. Ct. Crim. App. Apr. 18, 2016) (per curiam); *United States v. Perez*, No. ARMY 20071308, 2009 WL 6826394 (A. Ct. Crim. App. May 7, 2009) (per curiam); *United States v. Felix*, No. NMCM 200000097, 2002 WL 318267 (N-M. Ct. Crim. App. Feb. 26, 2002); *United States v. Osuna*, 56 M.J. 620 (C.G. Ct. Crim. App. 2001); *United States v. Dear*, 40 M.J. 196 (C.M.A. 1994); *United States v. Lowery*, 21 M.J. 998 (A.C.M.R. 1986), *aff’d*, 24 M.J. 347 (C.M.A. 1987).

47. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539D, 135 Stat. 1541, 1699–1700 (2021).

48. Exec. Order No. 14,062, 87 Fed. Reg. 4763, 4784–86 (Jan. 26, 2022).

deter and, when deterrence fails, punish the misconduct. Second, it demonstrates Congress's exercise of its constitutional authority and responsibility to make rules for the government and regulation of the military.⁴⁹ Without an effective military justice system, Congress's ability to influence the military's governance would be diminished.

Even where civilian analogues to UCMJ offenses exist, unique military interests sometimes warrant more robust application than civilian courts would typically provide. For example, a civilian jurisdiction may view a low-dollar-value larceny as a minor offense more appropriately handled by a pretrial diversion program than criminal prosecution.⁵⁰ In the military, on the other hand, any theft from another service member "is a very serious offense."⁵¹ As the Court of Appeals for the Armed Forces has explained, "[f]rom basic training onwards, servicemembers are taught to trust their fellow servicemembers with their life, and barracks theft substantially damages that trust."⁵²

Drug laws provide another example. Many states have reformed their drug laws to exclude possession of small amounts of marijuana.⁵³ Even though marijuana possession remains criminalized nationwide under federal law,⁵⁴ civilian prosecutors may not view recreational use of marijuana or some other controlled substances as warranting criminal prosecution. In contrast, the military has a special interest in deterring the use of marijuana and other drugs that could create risks to mission accomplishment and safety and for which there is no equivalent of

49. U.S. CONST. art. I, § 8, cl. 14.

50. See, e.g., Christine S. Scott-Hayward, *Rethinking Federal Diversion: The Rise of Specialized Criminal Courts*, 22 BERKELEY J. CRIM. L. 47, 65, 68–69 (2017) (noting that U.S. attorneys' offices offered pretrial diversion most frequently for low-level financial crimes, including theft); Cory R. Lepage & Jeff D. May, *The Anchorage, Alaska Municipal Pretrial Diversion Program: An Initial Assessment*, 34 ALASKA L. REV. 1, 7–8, 12, 15, 22 n.63 (2017) (noting that a study of Alaska's state criminal justice system found that theft was among the common offense categories referred for pretrial diversion).

51. *United States v. Soller*, No. ACM 31062, 1995 CCA LEXIS 277, at *2 (A.F. Ct. Crim. App. Oct. 12, 1995) (per curiam).

52. *United States v. Stefan*, 69 M.J. 256, 259 n.2 (C.A.A.F. 2010).

53. According to a Congressional Research Service report, "[a]s of March 1, 2023, 21 states, DC, Guam, and the Northern Mariana Islands have enacted laws allowing the recreational use of marijuana." Lisa N. Sacco, Joanna R. Lampe & Hassan Z. Sheikh, *The Federal Status of Marijuana and the Expanding Policy Gap with States*, CONG. RSCH. SERV. 1 (Mar. 6, 2023), <https://crsreports.congress.gov/product/pdf/IF/IF12270> [perma link unavailable].

54. 21 U.S.C. § 844; see also *id.* § 812 (including "Marihuana" as a Schedule I controlled substance). As the Supreme Court has explained, when marijuana became a Schedule I controlled substance in 1970, "the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study." *Gonzales v. Raich*, 545 U.S. 1, 14 (2005). The Attorney General is authorized to transfer a controlled substance to a different schedule or remove a drug or other substance from the schedules entirely. 21 U.S.C. § 811. To date, no Attorney General has altered marijuana's status as a Schedule I controlled substance.

blood-alcohol testing to assess impairment.⁵⁵ That interest is reflected by a UCMJ provision expressly criminalizing use or possession of marijuana, among other drugs.⁵⁶ That prohibition is enforced by, among other means, court-martial prosecutions.⁵⁷

2. *The U.S. Military Justice System Overseas*

Outside the United States, the need for a high-functioning military justice system is even greater. The United States maintains a larger military presence in foreign countries than any other nation.⁵⁸ Aside from the imperative of maintaining a disciplined force where the reach of U.S. law is otherwise tenuous, there are particular reasons to ensure the military justice system's effectiveness overseas. By demonstrating the ability to deal effectively with criminal conduct, the United States may foster a foreign nation's willingness to host a U.S. military installation. An effective military justice system also provides an alternative to host-nation justice systems that sometimes fail to provide a level of due process comparable to U.S. criminal proceedings. And a well-functioning military justice system is essential in a forward-deployed combat or occupation setting, where it may be the *only* criminal justice system that can regulate the behavior of U.S. armed forces.

55. See generally Robert M. Bray, Mary Ellen Marsden, John R. Herbold & Michael R. Peterson, *Progress Toward Eliminating Drug and Alcohol Abuse Among U.S. Military Personnel*, 18 *ARMED FORCES & SOC'Y* 476 (1992) (discussing the military drug testing program's origins from a 1981 airplane crash aboard an aircraft carrier that caused fourteen deaths and noting concerns that drug abuse in the military can adversely affect operational readiness).

56. UCMJ, art. 112a(b)(1), 10 U.S.C. § 912a(b)(1).

57. E.g., *United States v. Smith*, No. ACM 40202, 2023 WL 3294709 (A.F. Ct. Crim. App. May 5), *review granted in part*, No. 23-0207, 2023 WL 6605281 (C.A.A.F. Sept. 6, 2023); *United States v. Esemoto*, No. ACM 40273, 2023 WL 3018011 (A.F. Ct. Crim. App. Apr. 20), *review denied*, No. 23-0200, 2023 WL 5836899 (C.A.A.F. Aug. 2, 2023); *United States v. Figuero*, No. 202100048, 2023 WL 2726931 (N-M. Ct. Crim. App. Mar. 31), *review denied*, 83 M.J. 387 (C.A.A.F. 2023); *United States v. Jones*, No. ARMY20210623, 2023 WL 2566254 (A. Ct. Crim. App. Mar. 13, 2023); *United States v. Brissa*, No. ACM 40206, 2023 WL 2230584 (A.F. Ct. Crim. App. Feb. 27), *review denied*, 83 M.J. 388 (C.A.A.F. 2023); *United States v. Reimers*, No. ACM 40141, 2023 WL 414923 (A.F. Ct. Crim. App. Jan. 26), *review denied*, 83 M.J. 313 (C.A.A.F. 2023); *United States v. Journigan*, No. ACM S32716, 2022 WL 17245106 (A.F. Ct. Crim. App. Nov. 28, 2022), *review denied*, 83 M.J. 317 (C.A.A.F. 2023); *United States v. Ramirez*, No. ACM S32538, 2022 WL 11131599 (A.F. Ct. Crim. App. Oct. 19, 2022) (per curiam), *review denied*, 83 M.J. 270 (C.A.A.F. 2023); *United States v. McClenney*, No. ACM S32712, 2022 WL 4546851 (A.F. Ct. Crim. App. Sept. 29, 2022), *review denied*, 83 M.J. 249 (C.A.A.F. 2023); *United States v. Yarberry*, No. 202100117, 2022 WL 2913889 (N-M. Ct. Crim. App. July 25, 2022); *United States v. Novelli*, No. ACM 40103, 2022 WL 2911743 (A.F. Ct. Crim. App. July 12, 2022) (per curiam), *review denied*, 83 M.J. 450 (C.A.A.F. 2023); *United States v. Hoefs*, No. ARMY20200558, 2022 WL 2704557 (A. Ct. Crim. App. July 11), *review denied*, 83 M.J. 74 (C.A.A.F. 2022).

58. *Military Deployments*, CENT. INTEL. AGENCY, <https://www.cia.gov/the-world-factbook/field/military-deployments/> [<https://perma.cc/QJ7U-ZG9Z>] (last visited Dec. 15, 2023).

3. *The Mass-Mobilization Context*

Finally, the military must maintain a justice system capable of operating in a mass-mobilization context. As the Military Justice Review Group wisely observed:

The military justice system must be sufficiently flexible to function effectively across a wide variety of national and international environments, personnel practices, and operational requirements, regardless of whether the forces are composed of highly motivated volunteers, reluctant conscripts, or a combination of the two. In that regard, the military justice system must be designed not only for today's force, but also for the wide array of force structures that may be needed to address the national security challenges of the future.⁵⁹

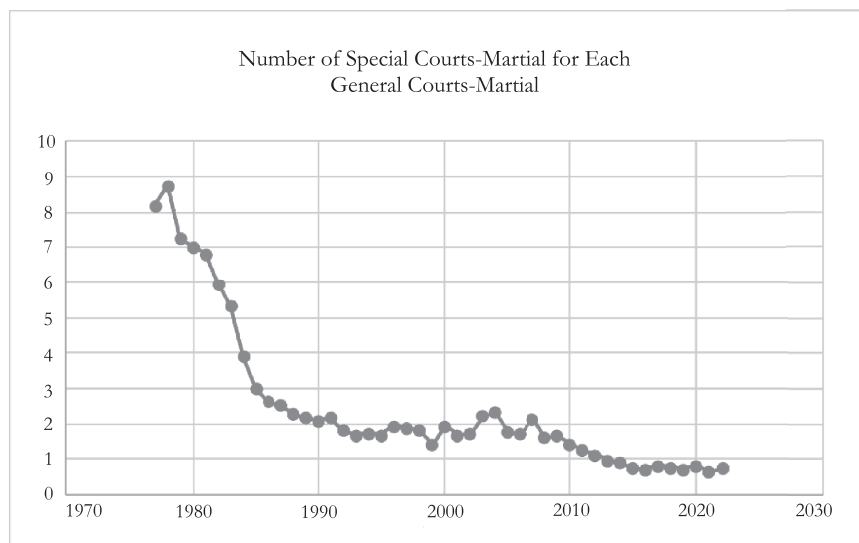
A military exigency requiring a mass mobilization may provide little opportunity to refine the military justice system's extant structure. Effective planning requires a military justice system that can serve as a skeleton to be fleshed out as necessary.

To the extent that the military justice decrescendo threatens the system's viability, therefore, it constitutes a threat to important U.S. national security interests.

B. *The Decline in the Ratio of Special to General Courts-Martial*

One aspect of the military justice decrescendo is particularly problematic for the development of skilled judge advocates: the declining ratio of special to general courts-martial. Ideally, special court-martial cases—with their lower stakes—would be a training ground for relatively inexperienced counsel, allowing them to develop their craft before moving on to general court-martial cases. For much of the forty-seven-year study period, the system provided that opportunity. While the gap generally narrowed over time, the number of special courts-martial remained at least twice that of general courts-martial until FY 1992 and then again during FYs 2003 and 2004. But starting in FY 2013 and in every year thereafter, the number of general courts-martial exceeded that of special courts-martial. The opportunity to use special courts-martial as both a training opportunity and a proving ground had largely dissipated.

59. MIL. JUST. REV. GRP., REPORT OF THE MILITARY JUSTICE REVIEW GROUP PART I: UCMJ RECOMMENDATIONS 91 (2015), <https://jsc.defense.gov/Portals/99/MJRG%20Part%201.pdf> [<https://perma.cc/7545-K2ZH>]. The Military Justice Review Group, headed by former Court of Appeals for the Armed Forces Chief Judge Andrew S. Effron, was established by the General Counsel of the Department of Defense to conduct a holistic review of the military justice system and recommend improvements. *Id.* at 5–6, 14, 1271–77. Its work led to the enactment of the Military Justice Act of 2016. See James A. Young, *Post-Trial Procedure and Review of Courts-Martial Under the Military Justice Act of 2016*, ARMY LAW., Jan. 2018, at 31, 31.



In a 1998 lecture, Brigadier General John Cooke—then the U.S. Army Legal Services Agency’s Commander and Chief Judge of the Army Court of Criminal Appeals—noted the adverse effect of diminishing court-martial numbers on military practitioners’ litigation skills. He cautioned that caseloads “remain well below where they were ten or twenty years ago, on both per capita and absolute bases” and provide fewer opportunities “for counsel to learn the basics, and the serious nature of the cases we do try means they are thrown into the deep end of the pool before they are really good swimmers.”⁶⁰ In FY2022, the combined number of general and special courts-martial was about one-fourth that when General Cooke spoke.⁶¹

60. John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 13 (1998).

61. The combined total number of general and special courts-martial in FY 1998 was 4,510. JOINT ANNUAL REPORT OF THE CODE COMMITTEE PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE: OCTOBER 1, 1997 TO SEPTEMBER 30, 1998 app. U.S. Army Military Justice Statistics 1, app. U.S. Navy/Marine Corps Military Justice Statistics 1, app. U.S. Air Force Military Justice Statistics 1 (1998), <https://www.armfor.uscourts.gov/annual/FY98Rept.htm> [<https://perma.cc/JV6J-EHNC>]. By FY2022, that combined number had shrunk to 1,179. JUDGE ADVOC. GEN., U.S. AIR FORCE, REPORT ON THE STATE OF MILITARY JUSTICE FOR FISCAL YEAR 2022, at 19 (2022), [https://jsc.defense.gov/Portals/99/Article%20146%20reports/All%20Service%27s%20Article%20146a%20reports%20for%20FY22%20\(binder\).pdf?ver=0NidRcQfxFK9M1lvTff-6w%3d%3d](https://jsc.defense.gov/Portals/99/Article%20146%20reports/All%20Service%27s%20Article%20146a%20reports%20for%20FY22%20(binder).pdf?ver=0NidRcQfxFK9M1lvTff-6w%3d%3d) [perma link unavailable]; OFF. JUDGE ADVOC. GEN., U.S. ARMY, REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2022, at 16 (2022), [https://jsc.defense.gov/Portals/99/Article%20146%20reports/All%20Service%27s%20Article%20146a%20reports%20for%20FY22%20\(binder\).pdf?ver=0NidRcQfxFK9M1lvTff-6w%3d%3d](https://jsc.defense.gov/Portals/99/Article%20146%20reports/All%20Service%27s%20Article%20146a%20reports%20for%20FY22%20(binder).pdf?ver=0NidRcQfxFK9M1lvTff-6w%3d%3d) [perma link unavailable]; HEADQUARTERS U.S. MARINE CORPS JUDGE ADVOC. DIV., REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2022, at 13 (2022), [https://jsc.defense.gov/Portals/99/Article%20146%20reports/All%20Service%27s%20Article%20146a%20reports%20for%20FY22%20\(binder\).pdf?ver=0NidRcQfxFK9M1lvTff-6w%3d%3d](https://jsc.defense.gov/Portals/99/Article%20146%20reports/All%20Service%27s%20Article%20146a%20reports%20for%20FY22%20(binder).pdf?ver=0NidRcQfxFK9M1lvTff-6w%3d%3d) [perma link unavailable]; OFF. JUDGE ADVOC. GEN., U.S. NAVY, REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2022, at 16 (2022), [https://jsc.defense.gov/Portals/99/Article%20146%20reports/All%20Service%27s%20Article%20146a%20reports%20for%20FY22%20\(binder\).pdf?ver=0NidRcQfxFK9M1lvTff-6w%3d%3d](https://jsc.defense.gov/Portals/99/Article%20146%20reports/All%20Service%27s%20Article%20146a%20reports%20for%20FY22%20(binder).pdf?ver=0NidRcQfxFK9M1lvTff-6w%3d%3d) [perma link unavailable].

Military justice practitioners' lack of experience shows. A recent report by the Independent Review Commission on Sexual Assault in the Military (IRC) was unsparing in its criticism: "those litigating special victim cases—largely through no fault of their own—do not possess the characteristics and skills that enable and improve efficiency and performance of their job which fosters institutional competence."⁶² More senior military justice practitioners, the report noted, "described junior prosecutor courtroom performance as ranging from 'terrible' to 'incompetent.'"⁶³ There is little prospect for improvement in a system where the average experience level of not only the trial litigators but also their supervisors and the military judges before whom they practice shrinks along with the overall caseload.

IV. EXPLORING THE MILITARY JUSTICE DECRESCENDO'S CAUSES

Identifying the military justice decrescendo's causes is crucial to developing possible remedies. Why did it occur?

A. *Crime Data*

One salutary factor contributing to the military justice decrescendo is an apparent drop in the number of service members committing crimes. The Army's crime report for FY 2018, the most recent released by the Army, documents that decline.⁶⁴ The report demonstrates that the number of soldiers who were alleged offenders shrank by approximately thirty-nine percent from FY 2011 to FY 2018.⁶⁵ The decrease in soldiers who were alleged violent felony offenders was less pronounced; that figure declined by twenty-four percent.⁶⁶ The number of soldiers who were alleged non-violent felony offenders dropped by thirty-six percent.⁶⁷ Finally, the number of soldiers who were alleged misdemeanor offenders fell more than any other category: that number was forty-one percent

reports/All%20Service%27s%20Article%20146a%20reports%20for%20FY22%20(binder).pdf?ver=0NidRcQfxFK9M1lvTff6w%3d%3d [perma link unavailable].

62. INDEP. REV. COMM'N ON SEXUAL ASSAULT IN MIL., *HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY* 39 (2021), <https://media.defense.gov/2021/Jul/02/2002755437/-1/-1/0/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF> [https://perma.cc/27A7-4QCA] [hereinafter *RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION*].

63. *Id.* at 40.

64. OFF. PROVOST MARSHAL GEN., *FY2018 ARMY CRIME REPORT* 4 (2019), https://cdn.muckrock.com/foia_files/2022/06/28/FY2018ArmyCrime_Report_redacted_FINAL.pdf [https://perma.cc/U2NB-YWFL] [hereinafter *FY2018 ARMY CRIME REPORT*]. The Army produced the report in response to a Freedom of Information Act request from MuckRock. *Request for FY2019 Army Crime Report*, MUCKROCK, <https://www.muckrock.com/foi/united-states-of-america-10/fy2019-army-crime-report-103924/> [https://perma.cc/R7ST-ZQT4] (last visited Dec. 13, 2023).

65. *FY2018 ARMY CRIME REPORT*, *supra* note 64, at 18.

66. *Id.* at 19.

67. *Id.* at 20.

less in FY 2018 than in FY 2011.⁶⁸ Over the same period, the number of Army general court-martial cases tried to completion declined almost thirty-nine percent, while the number of Army special court-martial cases plunged by seventy-three percent.⁶⁹

Those statistics suggest that general court-martial utilization fluctuates relatively directly with the number of alleged offenders susceptible to trial by court-martial. But utilization of special courts-martial displayed no such nexus. That variance reflects a greater elasticity in referrals to special courts-martial compared to general courts-martial. For example, assuming there is sufficient admissible evidence to warrant prosecution and civilian prosecutorial authorities do not try the case, a service member accused of homicide, robbery, maiming, or some other serious violent crime will almost invariably be tried at a general court-martial. For the less serious types of offenses typically referred to special courts-martial, on the other hand, reasonable alternative forms of disposition are often available. Those include a summary court-martial, nonjudicial punishment, initiation of administrative discharge proceedings seeking a stigmatizing characterization of service, transfer to another command, or some combination of those approaches. There has been a long-term decline in court-martial convening authorities' choice to use special courts-martial rather than available alternatives.

B. *Tempo*

Another musical term may help explain the special court-martial decrescendo: tempo. The military justice system was intended to provide military commanders with an expeditious means to resolve allegations of misconduct against service members.⁷⁰ It no longer serves that purpose. For cases whose mode of disposition is most elastic—those traditionally referred for trial by special court-martial—the extensive delay in disposition that now characterizes the military justice system likely significantly deters court-martial utilization. In the Navy, for example, the average number of days from the commencement of an investigation to a special court-martial verdict for FYs 2016 through 2018 and for the first three

68. *Id.* at 23.

69. *Compare* ANNUAL REPORT SUBMITTED TO COMMITTEES ON ARMED SERVICES OF THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES AND TO THE SECRETARY OF DEFENSE, SECRETARY OF HOMELAND SECURITY, AND THE SECRETARIES OF THE ARMY, NAVY, AND AIR FORCE PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE: OCTOBER 1, 2010 TO SEPTEMBER 30, 2011, at 21 (2011), <https://www.armfor.uscourts.gov/annual/FY11AnnualReport.pdf> [<https://perma.cc/T2XA-K4BE>] (617 general courts-martial and 464 special courts-martial tried in the Army in FY 2011), *with* OFF. JUDGE ADVOC. GEN., U.S. ARMY, U.S. ARMY REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2018, at 13 (2018), <https://jsc.defense.gov/Portals/99/Documents/Article%20146a%20Reports%20-%20FY18%20-%20All%20Services.pdf?ver=2019-09-19-163824-157> [<https://perma.cc/S8J7-76U7>] (378 general courts-martial and 124 special courts-martial tried to completion in the Army in FY 2018).

70. Daniel P. Shaver, *Restoring the Promise of the Right to Speedy Trial to Service Members in Pretrial Arrest and Confinement*, 147 MIL. L. REV. 84, 98 (1995).

quarters of FY 2019 were 335, 351, 405, and 357.⁷¹ A process that drags on for approximately a year is an unattractive option for addressing military disciplinary challenges.

For alleged offenses occurring after December 27, 2023, the decision whether to refer a case involving one of thirteen statutorily prescribed offenses to a general or special court-martial has moved from traditional military commander convening authorities⁷² to military lawyers designated as “special trial counsel.”⁷³ Those thirteen statutorily prescribed “covered offenses” include such serious crimes as murder, rape, sexual assault, kidnapping, and domestic violence.⁷⁴ Sexual harassment offenses committed after January 1, 2025, will also fall under the authority of special trial counsel provided that a formal complaint is filed and that complaint is substantiated.⁷⁵ Military lawyers now directly affect court-martial utilization rates for covered offenses. But traditional military commander convening authorities still control the disposition of offenses under seventy-four other punitive articles in addition to sixteen presidentially prescribed offenses under Article 134 of the UCMJ, the “General Article.”⁷⁶ The extent to which traditional military commander

71. EXEC. REV. PANEL, COMPREHENSIVE REVIEW OF THE DEPARTMENT OF THE NAVY'S UNIFORMED LEGAL COMMUNITIES 90 (2019), <https://media.defense.gov/2020/May/18/2002301989/-1/-1/1/COMPREHENSIVE%20REVIEW%20DON%20UNIFORMED%20LEGAL%20COMMUNITIES.PDF> [<https://perma.cc/SD63-JAGR>].

72. The UCMJ designates certain military commanders as general, special, and summary court-martial convening authorities, while authorizing certain civilian officials to designate additional commanding officers as convening authorities. UCMJ, arts. 22, 23, 24, 10 U.S.C. §§ 822, 823, 824. The UCMJ also designates six high-level civilian officials, including the President, as general court-martial convening authorities. *Id.* art. 22(a) (1), (2), (4), 10 U.S.C. § 822(a) (1), (2), (4). General court-martial convening authorities may also convene special and summary courts-martial and special court-martial convening authorities may also convene summary courts-martial. *Id.* arts. 23(a) (1), 24(a) (1), 10 U.S.C. §§ 823(a) (1), 824(a) (1).

73. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, §§ 531–539C, 135 Stat. 1541, 1692–99 (2021); James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 541(b) (1), 136 Stat. 2395, 2579–80 (2022). For eleven of the covered offenses, special trial counsel may also choose to exercise authority over alleged violations that precede December 28, 2023. National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 531(c), 137 Stat. 136, 258–59 (2023) (to be codified at 10 U.S.C. § 824a(d)).

74. The full list is: wrongful broadcast or distribution of intimate visual images, murder, manslaughter, death or injury of an unborn child, rape and sexual assault generally, mails, deposit of obscene matter, rape and sexual assault of a child, other sexual misconduct, kidnapping, domestic violence, stalking, retaliation, and child pornography, as well as conspiracies, solicitations, and attempts to commit those offenses. National Defense Authorization Act for Fiscal Year 2022 § 533 (as amended by James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 § 541(a)). The list of covered offenses will be codified at UCMJ, art. 1(17), 10 U.S.C. § 801(17).

75. James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 § 541(a). Traditional commander convening authorities also exercise prosecutorial discretion over all allegations of sexual harassment committed before January 2, 2025. They will continue to exercise prosecutorial discretion over the subset of allegations of sexual harassment committed after January 1, 2025, in which a formal complaint is not both made and substantiated.

76. See *MCM*, *supra* note 2, pt. IV, ¶¶ 92–94, 96–108.

convening authorities choose to refer charges for trial by court-martial—and particularly by special court-martial—will therefore continue to affect the military justice system’s viability.

The military justice system’s slow tempo has another significant adverse effect: it deters some victims from engaging the system in the first place while leading many complaining witnesses who initially chose to engage in the investigative and prosecutorial processes to withdraw their cooperation. The IRC found that the military justice system’s “lengthy timeline was a primary reason for the non-reporting of serious sexual assaults.”⁷⁷ A comprehensive study of reports of penetrative sexual assaults in FY 2017 found that eighty-two complaining witnesses (6.2% of all those who initially agreed to participate in the investigative process) withdrew their cooperation at the preliminary hearing or court-martial stage.⁷⁸ The IRC found that “in those cases where reports were made, the lengthy timeline was a primary reason given by victims for dropping out of the military justice process.”⁷⁹ While it is hypothetically possible for a court-martial case to continue despite the complaining witness’s reluctance, Department of Defense policy provides that a “victim’s decision to decline to participate in an investigation or prosecution should be honored by all personnel charged with the investigation and prosecution of sexual assault cases.”⁸⁰

The military justice system’s plodding tempo likely depresses the level of court-martial utilization in at least three ways: (1) by deterring commander convening authorities from using it, (2) by deterring some victims from reporting a crime to law enforcement officials, and (3) by driving some initially cooperative complaining witnesses to withdraw their support. Quickening the system’s tempo could be one step in slowing or even reversing the military justice decrescendo.

CONCLUSION

Musical compositions often end by fading to silence. If the military justice decrescendo continues, that could be the fate of the American court-martial system.

77. RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION, *supra* note 62, at 56.

78. DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION, & DEF. SEXUAL ASSAULT ARMED FORCES, REPORT ON INVESTIGATIVE CASE FILE REVIEWS FOR MILITARY ADULT PENETRATIVE SEXUAL OFFENSE CASES CLOSED IN FISCAL YEAR 2017, at 105, 117 (2020), https://dacipad.whs.mil/images/Public/08-Reports/08_DACIPAD_CaseReview_Report_20201019_Final_Web.pdf [<https://perma.cc/VA2T-YXL6>].

79. RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION, *supra* note 62, at 56–57.

80. DEP’T DEF., INST. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE: PROGRAM PROCEDURES 42 (2013), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/649502_vol01.PDF?ver=onrMr14-MNbCcN4PkGmWVQ%3d%3d [<https://perma.cc/N8Q3-VCK3>] (updated through Change 7, September 6, 2022).